Young, James

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) - Compensation

Per diem paid to a worker while in travel status is included as "wages" for purposes of computing time-loss compensation. **….*In re James Young*, BIIA Dec., 89 3233 (1991)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-02377-2. *Overruled by implication*, *In re Cockle v Department of Labor & Indus*., 142 Wn.2d 801 (2001).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JAMES A. YOUNG	)	**DOCKET NO. 89 3233**
	)	
CLAIM NO. J-567636	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, James A. Young, by
Solan, Doran, Milhem & Hertel, P.S., per
James T. Solan (withdrawn) and by
Powell & Morris, P.S., per Larry J. Kuznetz

Employer, Pay 'n Pak Electric and Plumbing Supply, Inc.,
None

Department of Labor and Industries, by
The Attorney General, per
Stephanie M. Farrell and Kent E. Mumma, Assistants, and Gary W. McGuire, Paralegal

This is an appeal filed by the claimant, James A. Young, on July 24, 1989 from an order of the Department of Labor and Industries dated May 31, 1989 which provided:

> WHEREAS request has been made to have employer paid "per diem" included with wages for the purpose of time loss benefits computation, and there being no known statutory authority granting such inclusion, the request is denied.

REVERSED AND REMANDED

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on October 19, 1990 in which the order of the Department dated May 31, 1989 was affirmed.

Like our Industrial Appeals Judge, we wish to commend the parties for the memoranda of law which they have submitted and which have been helpful in resolving this appeal. The issue raised by this appeal is whether the per diem food allowance which Mr. Young received from the employer when he was in travel status comes within the statutory definition of "wages" for purposes of calculating Mr. Young's time loss compensation rate. RCW 51.08.178 (1980).

Prior to addressing that question, we must resolve an issue raised by the Department. The Department argues that Mr. Young cannot challenge his time loss rate because prior orders establishing his time loss rate have become final and are res judicata.

On July 30, 1985 the Department issued an order which stated in pertinent part:

> Rate of time loss compensation is based on single plus 0 dependent child(ren) and wages at the time of injury, or exposure, of $1,381.60 per month.

Exhibit B. That order apprised Mr. Young that the basis for the Department's calculation of the applicable time loss rate was the Department's determination that his monthly wage was $1,381.60. However, Mr. Young timely protested the July 30, 1985 order on August 9, 1985. In response to that protest, the Department, on August 16, 1985, issued an order which corrected and superseded the July 30, 1985 order, modifying that order from final to interlocutory. The August 16, 1985 order also paid time loss compensation for the period of July 2, 1985 through August 1, 1985.

On March 25, 1988 claimant's attorney requested that, in addition to Mr. Young's hourly wage of $7.85, the Department should also consider his $15.00 per diem in calculating his time loss compensation rate. Exhibit D. The claimant himself also advised the Department in August 1988 that he had been receiving per diem from his employer. Exhibit E. The Department claims manager wrote the claimant on September 20, 1988, stating: " ... gross income does not include: ... 2) food or lodging (per diem) for working away from your usual job site." Exhibit F. Further correspondence ensued. Eventually the Department issued the May 31, 1989 order currently under appeal.

Based on this procedural history, we conclude that the July 30, 1985 Department order never became final. That order was timely protested. In response, the Department modified that order from final to interlocutory. Eventually the May 31, 1989 order was issued, determining that:

> Whereas request has been made to have employer paid "per diem" included with wages for the purpose of time loss benefits computation, and there being no known statutory authority granting such inclusion, the request is denied.

That order was timely appealed to this Board.

Apparently Mr. Young has continued to receive time loss at the rate established on an interlocutory basis by the July 30, 1985 Department order (with cost of living increases), although those subsequent orders were not made a part of the record. Nor does the Department contend that any of those subsequent orders determined what Mr. Young's wage was at the time of injury. On this record, we can discern no reason why we should apply the doctrine of res judicata to preclude Mr. Young from challenging the rate of time loss compensation paid throughout the time that this claim has been open. See In re Louise J. Scheeler, Dckt. No. 89 0609 (November 13, 1990). We conclude that the question of whether the per diem food allowance which claimant received from his employer when

he was in travel status comes within the statutory definition of "wages" for purposes of calculating Mr. Young's time loss compensation rate is properly before us.

This is a question of first impression in this state. RCW 51.08.178 (1980), as it read at the time of Mr. Young's injury, provided:

> The term "wages" shall include the reasonable value of board, housing, fuel or other consideration of like nature received from the employer, but shall not include overtime pay, tips, or gratuities.[1]

One Board decision and one Washington Court of Appeals decision, while not directly on point, provide some guidance in interpreting this statutory provision.

In re Lisa K. Soden, BIIA Dec., 85 2993 (1987) involved a food service worker whose employer provided her meals and required her to take a 40 minute break daily for such meals. Ms. Soden ate some of the meals provided. The employer reported the value of those meals to the IRS as wages paid to Ms. Soden. The Board concluded that meals provided to Ms. Soden by the employer constituted "board" for purposes of computing her wages and her time loss compensation rate under RCW 51.08.178.

Rose v. Dep't of Labor & Indus., 57 Wn.App. 751 (1990) involved an honor camp inmate who was injured while working under the supervision of the Department of Natural Resources. Among other things, he contended that the room and board which he received as an inmate of the correctional facility should be included within his wage for purposes of computing his time loss rate. The court rejected that contention, construing the term "wages" as used in RCW 51.08.178 "to include any and all forms of consideration received by the employee from the employer in exchange for work performed." Rose, at 758.

In Rose, the court agreed that:

> ... the room and board was not provided as consideration, but rather, as an incident of confinement . . . . [T]o the extent such confinement would have been "provided" to Rose regardless of whether Rose rendered

---

[1] 1 This statute was amended by Laws of 1988, ch. 161,] 12 as follows:

> The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, ...

That amendment is not applicable here.

> services to DNR, such confinement cannot be said to constitute consideration for work performed.

Rose, at 759.

In addition to these Washington cases, Professor Larson has surveyed how other jurisdictions have approached the specific per diem question which is before us. See 2 A. Larson, Workmen's Compensation Law, § 60.12(a) at 10-624ff, Footnotes 6 and 6.1. A number of the cases cited by Professor Larson are attached to Claimant's Memorandum of Authorities. Professor Larson states the basic rule as follows:

> In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but anything of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board, constituting real economic gain to the employee. A car allowance is includable as wage only if it exceeds actual truck, or travel expenses.

Larson, at 10-624--10-632.

Of the cases cited by the claimant, the facts in Southwest Architectural Products Inc. v. Smith, 358 S.E.2d 745 (Va.App.1987) are most analogous to the facts in the current appeal. Southwest Architectural involved a worker who was hired to install and repair skylights." He was hired as part of a crew which traveled from one job location to another and stayed in motels near the various job sites." Southwest Architectural, at 746. He was on the road at different work sites throughout the time he worked for the employer. He was paid $7.50 per hour. At the time of his injury, the employer paid lodging expenses directly to the motels where he stayed (previously this payment had been made directly to the claimant), paid the worker $15.00 per day for meals, and a mileage allowance of $.18 per mile if the worker drove and $.10 per mile if he was a passenger. All of these allowances were treated by the employer as expense reimbursements and were not reported to the IRS as income.

The applicable Virginia statute read as follows:

> Whenever allowances of any character made to an employee in lieu of wages are a specified part of the wage contract, they shall be deemed a part of his earnings.

Southwest Architectural, at 747. The Industrial Commission concluded that the food, lodging, and mileage allowances paid directly to the claimant were includable for purposes of determining his average weekly wage. The court affirmed.

The court relied on the general rule developed in other jurisdictions that:

> ... [A]llowances which constitute an economic gain to the employee, as opposed to mere reimbursement for expenses, are included as part of the employee's wage.

Southwest Architectural, at 748. The court also endorsed the concept enunciated by the Washington court in Rose, i.e., that the payment should be made in consideration for work. Southwest Architectural, at 748.

In concluding that the allowances paid to the worker for meals, lodging, and travel were "in lieu of wages", the Virginia court particularly noted:

> His allowances for meals and lodging thus covered everyday living expenses which were not uniquely related to his employment. Further, these allowances were uniformly and regularly paid, were not dependent upon Smith's actual expenses, and he was not required to account to the employer for how the funds were spent.

Southwest Architectural, at 749.

The court also rejected the employer's argument that the allowances should not be included as wages because they had not been reported to the IRS as income.

> Whether the employer and employee properly reported to the Internal Revenue Service payments of this character is not controlling. Classification of payments under the Act is a matter for state legislative determination; classification of payments for federal tax purposes is a matter for congressional and Internal Revenue Service determination. The considerations underlying the resolution of these classification issues are not necessarily the same. Thus, neither logic nor policy requires consistent treatment.

Southwest Architectural, at 750.

Unlike Southwest Architectural, the appeal before us only involves a daily food allowance paid to the worker by the employer. It does not involve travel and lodging expenses. The parties stipulated to the relevant facts.

Mr. Young was employed as a merchandiser by Pay 'n Pak when he sustained his industrial injury on April 22, 1985. He was paid an hourly wage of $7.85. His job duties required him to travel to cities in California, Montana, Colorado, Oregon and Washington, to set up displays in new stores, and rearrange old stores. He was part of a crew. When one store was finished, he would move on to the next one with the crew. Since part of the contract of employment entailed travel to various cities, that contract included a per diem amount for food expenses for each day spent away from his permanent

residence. The per diem was part of the total consideration for accepting the job as merchandiser for the employer. Lodging expenses were paid directly to the vendor by the employer.

For per diem purposes, the employer considered Spokane, Washington as the claimant's permanent residence. Claimant's residence was determined by the employer as of the date of hire. The claimant was hired in Spokane and did not receive per diem while working in Spokane. Mr. Young suffered his industrial injury while working in Spokane.

Mr. Young's pay checks were sent to him at the store he was working in at the time of their issue. He used his mother's address in Clarkston, Washington to receive all other mail. While working in Spokane, Mr. Young resided with his girlfriend.

The per diem paid for food was paid directly to the claimant, who was then responsible to pay for his own meals. At the time of injury, the per diem rate was $15.00. The allowance was paid to the claimant without regard to actual expenses and was not dependent upon Mr. Young's submitting documentation for actual expenses for food costs incurred. The claimant did not keep any records of food cost expenditures while being paid per diem. However, it is his contention that the actual costs incurred were generally less than the per diem amounts paid since usually he shared accommodations with other coworkers and they would cook their own meals.

The employer paid the per diem food allowance as an approximation of an average daily meal expense. The per diem was designed to avoid the company having to sift through numerous meal receipts, as well as avoiding the added burden on the employees of retaining and reporting all of the expenses relating to meals. The per diem was not reported by the employer to the IRS on the claimant's W-2 form as income. Nor did the claimant include the per diem as taxable wages, or as excess expenses, as required on IRS form 2106, on any federal income tax returns submitted during his employment with Pay 'n Pak stores.

Per diem was paid on a seven-day-a-week basis whenever Mr. Young was away from his personal residence of record, with the exception of every third weekend, when the employer would fly Mr. Young home, at which point he would not declare per diem for the weekend days he was home. Claimant averaged approximately 22 days per month for which per diem was paid. To date, no time loss compensation payments have included per diem as part of the basis for their calculation.

In its simplest terms, the question before us is whether the $15.00 per diem food allowance which the claimant received when he was in travel status (on an average of 22 days per month) constituted an economic gain for Mr. Young or whether it was reimbursement for business expenses

incurred as a result of his travel status. The Department has apparently established a blanket policy (Exhibit F) that per diem for food while the employee is working away from the usual job site is not includable within the monthly wage calculated under RCW 51.08.178. While this approach certainly simplifies claims administration, it does not comport with the statutory mandate of RCW 51.08.178. As noted above, that statute requires the inclusion of amounts paid by the employer to the worker for food, so long as those payments are consideration for work performed.

When an employee is in travel status, an employer's payment for food should not necessarily be analyzed in the same way as payment for lodging and travel expenses. Presumably, workers must eat wherever they are. As the Proposed Decision and Order suggests:

> . . . Meal reimbursement is distinguishable from other types of reimbursement related to travel, such as lodging, as there is no expense being incurred which would otherwise not be necessary. That is, people have to eat, whether they are at home or on the road

PD & O, Footnote 4, at 5.

It costs a certain amount per day to feed an individual. Mr. Young would have incurred that cost whether or not he was in travel status. So, to the extent the $15.00 per diem was simply covering a regular everyday cost of living, Mr. Young realized an economic gain from his employer. I n addition, to the extent that the per diem exceeded the amount Mr. Young needed to pay for his daily food requirements while he was on the road, Mr. Young also realized an economic gain.

It is, of course, arguable that the food per diem allowance was intended to reimburse Mr. Young for higher food costs incurred solely because his employment required him to travel. The following diagram may be helpful:

$15.00A Regular daily cost of meals

$15.00B Higher costs associated with travel

$15.00C Excess not expended for food

If Mr. Young in fact incurred higher costs for food because he was in travel status, then arguably portion B of the $15.00 per diem was simply reimbursement for a business expense and does not constitute a real economic gain. However, there is no suggestion that that was actually the situation here. From the parties' stipulation and the low dollar amounts involved, the reasonable inference is that the claimant was not expending any more for food while he was in travel status than he expended while in Spokane, his home base.

In addition, Mr. Young was not restricted in how he could use the per diem. He could spend the money any way he wanted. And he contends that he actually spent less for his meals than the per diem, because he stayed with co-workers and they cooked their own meals.

It is undisputed that, when Mr. Young was hired, part of his contract, indeed part of the inducement for taking the job, was the per diem. The vast majority of Mr. Young's work was performed away from Spokane; he was in travel status an average of 22 days per month. The per diem allowance was paid by the employer in exchange for Mr. Young performing work on a regular basis away from his residence. As the Virginia court said in Southwest Architectural and as the Industrial Appeals Judge acknowledged in his Proposed Decision and Order, the fact that the per diem was not reported to the IRS is not dispositive. We conclude that, given the facts of this case, the per diem Mr. Young received from Pay 'n Pak was consideration received from the employer in exchange for services performed. The entire $15.00 per diem constituted an economic gain for Mr. Young and is includable within wages for the purpose of computing time loss compensation under RCW 51.08.178.

Nothing in the Rose decision precludes this result. Indeed, unlike Mr. Rose, Mr. Young would not have received the $15.00 per diem but for the fact he was employed by this employer. Mr. Rose would have been housed and fed by the correctional institution regardless of his employment status.

Nor does the Soden decision dictate a different result. The fact that Mr. Young was in travel status when he received per diem for food and Ms. Soden was not in travel status when her employer provided her with a daily meal, does not change the analysis here.

The Department order of May 31, 1989 is reversed.

FINDINGS OF FACT

1. On April 22, 1985, the Department of Labor and Industries received an application for benefits indicating that on April 15, 1985, the claimant, James A. Young, sustained an industrial injury during the course of employment with Pay 'n Pak Electric and Plumbing Supply, Inc.

   On July 30, 1985, the Department issued an order allowing the claim. That order established the rate of time loss compensation based upon Mr. Young being a single man with no children and having a monthly wage at the time of injury of $1381.60. The order paid Mr. Young time loss compensation for the period of May 21, 1985 through May 27, 1985 in the amount of $193.42 and closed the claim with no permanent partial disability award.

   On August 5, 1985, the Department received a protest and request for reconsideration filed by a physician on behalf of the injured worker. On August 9, 1985, the Department received a protest and request for

reconsideration filed by the claimant. On August 16, 1985, the Department issued an order correcting and superseding the prior order issued July 30, 1985, modifying it from a final to an interlocutory order, and awarding time loss compensation benefits paid to August 1, 1985.

On March 28, 1988 claimant's attorney requested that claimant's time loss compensation rate be adjusted to reflect the per diem allowance he received while employed by Pay 'n Pak. Correspondence ensued and on May 31, 1989, the Department issued an order indicating that, "WHEREAS, request has been made to have employer paid "per diem" included with wages for the purpose of time loss benefits computation, and there being no known statutory authority granting such inclusion, the request is denied."

On July 24, 1989, the Board of Industrial Insurance Appeals received a notice of appeal filed on behalf of the claimant from the order issued May 31, 1989. On August 15, 1989, the Board issued an order granting the appeal, assigning Docket No. 89 3233, and directing that proceedings be scheduled.

2. On April 22, 1985, the claimant sustained an industrial injury. At the time of the injury, his hourly wage was $7.85.

3. At the time of the industrial injury, the injured worker was employed as a merchandiser, and employment responsibilities required traveling to different cities in the states of California, Montana, Colorado, Oregon and Washington. His permanent residence was Spokane, Washington.

4. As part of the contract of employment and part of the consideration for accepting the job, Mr. Young received a per diem payment of $15.00 per day, during periods of time when he was not working in Spokane, Washington. The per diem was paid for food expense.

5. Prior to the industrial injury, the injured worker averaged approximately 22 days per month for which per diem was paid, and it was paid on a seven day per week basis whenever the worker was not working in Spokane, Washington. On the date of the industrial injury, the claimant was actually working in Spokane, and therefore was not eligible to receive the per diem payment.

6. Mr. Young was not required to maintain any records of food costs or expenditures. Actual costs incurred by the claimant for food expense were generally less than the per diem amount being paid because of preparation of his own meals, and sharing accommodations with co-employees.

7. The per diem paid to the injured worker during the period of time at issue was not reported as income by the employer to the Internal Revenue Service on the worker's W-2 form, nor was the amount that the per diem exceeded actual expenses reported by the worker to the Internal Revenue Service as income upon form 2106.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.

2. The July 30, 1985 Department determination of Mr. Young's wage at time of injury never became final. Mr. Young is not barred by the doctrine of res judicata from challenging the Department's calculation of his time loss compensation rate. In re Louise Scheeler, Dckt. No. 89 0609 (November 13, 1990).

3. The $15.00 per diem paid to Mr. Young for food expense is includable in "wages" for purposes of determining the time loss compensation rate pursuant to RCW 51.08.178.

4. The Department order issued May 31, 1989 which denied the claimant's request to include an amount paid by the employer as a per diem allowance within wages for the purposes of time loss benefit computation is incorrect and is reversed. This claim is remanded to the Department of Labor and Industries with directions to include the $15.00 per diem allowance provided to Mr. Young by Pay 'n Pak Electric and Plumbing Supply, Inc. in the Department's computation of the claimant's wages under RCW 51.08.178 and to take such other and further action as indicated by the law and the facts, to include the recalculation of all previously paid time loss compensation in accordance with inclusion of the per diem allowance within the wage base.

It is so ORDERED.

Dated this first day of May, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

Dissent

I disagree with the majority's unwarranted expansion of what constitutes "wages" under the statute, for purposes of calculating time loss compensation benefits.

The per diem allowance for food was simply reimbursement for increased expenses generally associated with being in travel status and away from the employee's home base of employment. It

was not, by any reasonable view, consideration received in exchange for services performed in the course of employment.

Our Industrial Appeals Judge's Proposed Decision and Order completely and correctly resolved the legal issue presented, based on the stipulated facts. Furthermore, I believe it properly analyzed the two potentially precedential decisions, Soden and Rose. Soden is clearly distinguishable on its facts, and thus not applicable here; Rose is applicable here, in its holding that "wage" means consideration received "in exchange for work performed." The per diem allowance here--as in most cases involving per diem travel expense--was in my view simply reimbursement for increased expense generally expected in travel status and away from home. It was not given in exchange for Mr. Young's work performed as a merchandiser. That is what his hourly rate of pay was for.

I would adopt the discussion in the Proposed Decision and Order, from page 3, line 4, through page 6, line 7, as well as all Findings of Fact and Conclusions of Law therein. Thus, I would affirm the Department's order dated May 31, 1989.

Dated this first day of May, 1991.

/s/
PHILLIP T. BORK Member